BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of: JULIAN H., Claimant, and HARBOR REGIONAL CENTER, Service Agency.	OAH No. 2012080174

DECISION

Jennifer M. Russell, Administrative Law Judge, Office of Administrative Hearings, State of California, heard this matter in Torrance, California on September 25, 2012. Alberto H., claimant's parent, represented claimant.[1] GiGi Thompson, Manager Rights Assurance, represented Harbor Regional Center (HRC or service agency).

The matter submitted for decision on September 25, 2012. The Administrative Law Judge makes the following Factual Findings, Legal Conclusions and Order.

ISSUE

The sole issue presented is whether service agency should reduce claimant's weekly intensive behavior intervention (IBI) service hours from ten (10) to three (3) hours.

FACTUAL FINDINGS

1. Claimant is a nine-year-old consumer of HRC based on his qualifying diagnosis of Autism. He resides with his parents and sibling.

2. Since June 2008, HRC has been funding 10 hours per week of intensive behavioral intervention services through First Steps for Kids for claimant. According to a June 15, 2012 First Steps progress report, behavioral intervention for claimant focused on "expanding [claimant's] . . . repertoire of verbal behavior and functional communication, play skills, social behavior, and self-care and compliance with instructions from adults in authority. Acquisition targets, such as mands or following instructions, serve as replacement for behavioral excesses, allowing [claimant] . . . to benefit from interactions with his peers

[1] Initials are used to preserve confidentiality.

and familial relationships. Since the initiation of services, [claimant] . . . has shown considerable progress towards meeting the goals and objectives set forth at intake." (HRC Ex. 5.)

3. The five treatment goals and objectives identified for claimant in the June 15, 2012 First Steps progress report consist of the following:

a. "Replacement Behavior for Noncompliance & Non-Responsiveness-Compliance/Following Instructions: Accurately responding to verbal requests and instructions." Claimant reportedly demonstrated "consistent growth in the area of compliance and following instructions, and is making progress toward his Ultimate goal. . . . [Claimant] is able to follow 1- and 2-step instructions 80% of opportunities, or better, when [his] . . . attention is gained prior to giving the instruction. [Claimant] can follow three-step instructions, when attention is gained prior, in 70-80% of opportunities. With repetition of the instruction or if [claimant] is asked to rehearse the instructions first, compliance increases to 85-90% of opportunities." (Ex. 5.)

b. "Replacement Behavior for Social Non-Responsiveness/Intraverbal Behavior-Recalling Events: Recalling, describing, and discussing previous events and sharing information about one's life for the purpose of social communication as a means of maintaining attachment with loved ones." Claimant reportedly demonstrated "steady growth in this area of social behavior, and continues to make progress toward his Ultimate goal. [Claimant] . . . engages in brief conversational exchanges wit his peers, and will often share information about recent outings, weekend activities, or favorite pastimes." (Ex. 5.)

c. Under the category "Social Behavior Targets," "Recognizing individuals in authority (parents, teachers, instructors, coaches, and adults in general) and responding in a timely and appropriate manner to such individuals when addressed." Claimant reportedly "has continued to make good gains in this area . . . . With regards to his responsivity, [claimant] . . . now responds when asked to do so (either verbally or non-verbally) in 70% of opportunities or better. Remaining concerns lay in [claimant's] . . . protest or refusal behaviors, often with parents. For example, [claimant] . . . may be asked to carry out a task and will respond, saying "Why do I have to?" or "I don't want to." It should be noted that such behavior is observed in typically developing, same-aged peers, and is likely due to a lack of motivation." (Ex. 5.)

d. "Household chores: Contributing at home, through the daily completion of simple, age-appropriate tasks." Claimant reportedly "is making progress . . . . While [claimant] . . . is asked to make his bed each week day before leaving for school, parents report that [claimant] typically requires a minimum of 2-3 repetitions of the instruction before he will comply and complete the task. It is recommended that the family implement a self-monitoring system or simple "checklist' of required tasks that [claimant] must complete before leaving home in the morning in order to help keep him more accountable of his responsibilities." (Ex. 5.)

e. "Phone Skills: Placing and receiving phone calls in an age-appropriate manner. Reportedly, "this continues to be an area of need for [claimant], as he often fails to consider

each step needed in the process of answering a call and communicating with the caller. (Ex. 5.)

4. Having documented claimant's progress and continued improvement, the June 15, 2012 First Steps progress report nonetheless notes "[r]emaining concerns . . . in the areas of responsiveness to adults (particularly parents), social relations, and adaptive skills." The progress report also notes claimant's parents' "concerns in the area of executive functioning, including inhibition, initiation of tasks, self-monitoring, and planning and organization skills." There is no evidence that First Steps conducted any assessments or identified any treatment goals or objectives addressing claimant's parent's concerns. The June 15, 2012 First Steps progress report's concluding recommendation is for claimant to "continue to receive behavioral intervention services at a rate of 10 hours per week, provided by instructors trained in Applied Behavior Analysis methods across the home and community settings."

5. At a July 18, 2012 meeting followed by a July 31, 2012 letter memorializing that meeting, HRC informed claimant's parents of its determination not to continue funding claimant's in-home behavior intervention program at a rate of 10 hours per week effective August 31, 2012. HRC maintained that claimant has met his behavioral benchmarks set forth in the June 15, 2012 First Steps progress report. HRC additionally reported that, according to First Steps' executive director, Dr. Jennifer Harris, the recommendation to continue with 10 hours per week of behavioral intervention services "is inaccurate and is not consistent with the current goals being targeted in the program." (Ex. 3.) HRC recommended reducing claimant's IBI service hours to three hours per week effective September 1, 2012 "to allow continued consultation with First Steps for Kids to assure sustainability of the currently mastered skills throughout the transition process." HRC advised that "[t]his consultation program will be authorized at three hours per week for two months at which point services will terminate on October 31, 2012."

6. Claimant's parents oppose any reduction in his IBI service hours, and filed a Fair Hearing Request on August 3, 2012. Thereafter these proceedings ensued.

7. Edwin Pineda is an HRC counselor who authored the July 31, 2012 letter set forth in Factual Finding 5, and who participated in claimant's most recent Individual/Family Service Plan (IFSP) meeting. Pineda recently made a one-time observation of claimant in both his home and school settings. In the home, Pineda observed claimant responsive to directives. Pineda observed claimant playing on the school playground and saw him interacting with his peers. According to Pineda, claimant appeared engaged, claimant appeared to enjoy himself, and claimant's peers appeared to enjoy claimant's company. Pineda testified that HRC considered parent participation and collaboration positive contributing factors to claimant's progress on and maintenance of the goals and objectives set forth in Factual Finding 3. Pineda emphasized claimant's parents' mastery of skills needed to sustain claimant's achievement. Pineda testified that no new goals have been identified and articulated in the June 15, 2012 First Steps progress report, and that there were no discussions of any new maladaptive behaviors.

8. According to the testimony of Bonnie Ivers, an HRC clinical psychologist, making the bed and cleaning up after meals and play are "typical tasks that parents want a nine-year-old to perform." Ivers noted that claimant has had "some inattention difficulty" and "difficulty with follow through." She proposed adopting "typical parental strategies," such as "repetition" and a behavior chart identifying claimant's responsibilities to address these concerns. Ivers' testimony questioned characterizing deficient phone skills as a maladaptive behavior. According to Ivers, it is not developmentally appropriate to expect a nine-year-old to take a message. She testified that "teaching a child how to address a person on the phone is more a social communication issue." In Ivers opinion, "it is debatable whether claimant's household chores and phone skills goals need consistent, on-going intervention. Ten hours seem like an exorbitant amount of time to accomplish these two goals." Ivers' recommendation is "to address claimant's prompt cooperation and obstacles thereto." "Teach parents and teachers strategies for addressing [claimant's] follow through and cooperation."

9. At the hearing, claimant's parents presented persuasive evidence that claimant has maladaptive behaviors that were not addressed along with the five goals and objectives enumerated in the June 15, 2012 First Steps progress report. For example, Julie Kashiwai has known claimant since kindergarten and she worked with him in his after-school program. Kashiwai testified that claimant's peers routinely introduced new and different rules governing the games they played, which upset claimant causing him at times to exhibit aggression in the form of shouting and shoving. Kashiwai testified that "there was a mis-connect with the other kids."

10. Melodee Mah, a privately-funded instructional aid who, since 2010, has shadowed claimant three hours daily, fours days each week at his school, credibly testified that claimant engages in self-stimulatory behaviors including hand flapping, tongue clicking, and walking his fingers across the desk. During instructional times, claimant "zones out" and stares off into space. Claimant has outbursts when the instructor does not call on him. Claimant recently elbowed another child who was assigned to complete a coveted task. Claimant invades the personal space of others by touching, poking, and probing them. He smacks the buttocks of his peers and disregards their directives to stop. Mah testified that claimant's behaviors are disruptive of the classroom and affects his relationship with his school mates. Mah, who attends monthly First Step meetings where claimant's progress is discussed, has reported her observations to First Step using a form provided to her by First Step.

11. Claimant's mother identified several areas of overlapping and additional concerns about his behavior. Claimant lacks safety awareness when crossing streets and navigating parking areas. Claimant is inflexible during play with other children. He is quick to take offense even for unintentional or accidental occurrences. Mother testified that as claimant is getting older, he is exhibiting more aggression: he has jumped on and has hurt his younger sibling and he has spat on his mother when she attempted to re-direct him. His self-loathing behaviors include slapping his head and face and calling himself dumb. His self-stimulatory behaviors include circling the coffee table, winking his eyes, and reciting entire scripts for television commercials. Claimant's mother reports that during social conversations he goes off on tangents unrelated to the topic of discussion. Mother has to "try

to bring him back to our conversations." Claimant manifests anxiety by urinating on himself. Claimant has no neighborhood friends.

12. The full extent of claimant's on-going maladaptive behaviors was unknown to HRC when it proposed reducing his 10 hours of IBI service hours through First Steps. At the hearing, HRC recognized the need to assess claimant further to provide him with appropriate services and supports.

LEGAL CONCLUSIONS

1. Cause exists pursuant to Factual Findings 1 through 12, inclusive, and Legal Conclusions 2 through 6, inclusive, for HRC to discontinue funding 10 hours per week of IBI services through First Steps for claimant at this time.

2. The State of California accepts responsibility for persons with developmental disabilities under the Lanterman Developmental Disabilities Services Act. (Welf. & Inst. Code, § 4500 et seq.) The Lanterman Act mandates that an "array of services and supports should be established . . . to meet the needs and choices of each person with developmental disabilities . . . and to support their integration into the mainstream of life in the community." (Welf. & Inst. Code, § 4501.) Regional centers play a critical role in the coordination and delivery of services and supports for persons with disabilities. (Welf. & Inst. Code, § 4620 et seq.) Regional centers are responsible for developing and implementing individualized program plans (IPP) for consumers, for taking into account individual consumer needs and preferences, and for ensuring service cost effectiveness. (Welf. & Inst. Code, §§ 4646, 4646.5, 4647, and 4648.)

3. The services and supports to be funded for a consumer is determined by the IPP process, which involves collaboration with the consumer and service agency representatives. Services and supports for persons with developmental disabilities are defined as "specialized services and supports or special adaptations of generic services and supports directed toward the alleviation of a developmental disability or toward the social, personal, physical, or economic habilitation or rehabilitation of an individual with a developmental disability, or toward the achievement and maintenance of independent, productive, normal lives." Services and supports can include those providing behavior training and behavior modification programs. (Welf. & Inst. Code, § 4512, subd. (b).)

4. Welfare and Institutions Code section 4686.2, which regulates the provision of ABA services, states the following:

> (a) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, any vendor who provides applied behavioral analysis (ABA) services, or intensive behavioral intervention services or both, as defined in subdivision (d) shall:
>
> (1) Conduct a behavioral assessment of each consumer to whom the vendor provides these services.

(2) Design an intervention plan that shall include the service type, number of hours and parent participation needed to achieve the consumer's goals and objectives, as set forth in the consumer's individual program plan (IPP) or individualized family service plan (IFSP). The intervention plan shall also set forth the frequency at which the consumer's progress shall be evaluated and reported.

(3) Provide a copy of the intervention plan to the regional center for review and consideration by the planning team members.

(b) Effective July 1, 2009, notwithstanding any other provision of law or regulation to the contrary, regional centers shall:

(1) Only purchase ABA or intensive behavioral intervention services that reflect evidence-based practices, promote positive social behaviors, and ameliorate behaviors that interfere with learning and social interactions.

(2) Only purchase ABA or intensive behavioral intervention services when the parent or parents of minor consumers receiving services participate in the intervention plan for the consumers, given the critical nature of parent participation to the success of the intervention plan.

(3) Not purchase either ABA or intensive behavioral intervention services for purposes of providing respite, day care, or school services.

(4) Discontinue purchasing ABA or intensive behavioral intervention services for a consumer when the consumer's treatment goals and objectives, as described under subdivision (a), are achieved. ABA or intensive behavioral intervention services shall not be discontinued until the goals and objectives are reviewed and updated as required in paragraph (5) and shall be discontinued only if those updated treatment goals and objectives do not require ABA or intensive behavioral intervention services.

(5) For each consumer, evaluate the vendor's intervention plan and number of service hours for ABA or intensive behavioral intervention no less than every six months, consistent with evidence-based practices. If necessary, the intervention plan's treatment goals and objectives shall be updated and revised.

(6) Not reimburse a parent for participating in a behavioral services treatment program.

(c) For consumers receiving ABA or behavioral intervention services on July 1, 2009, as part of their IPP or IFSP, subdivision (b) shall apply on August 1, 2009.

(d) For purposes of this section the following definitions shall apply;

(1) "Applied behavioral analysis" means the design, implementation, and evaluation of systematic instructional and environmental modifications to promote positive social behaviors and reduce or ameliorate behaviors which interfere with learning and social interaction.

(2) "Intensive behavioral intervention" means any form of applied behavioral analysis that is comprehensive, designed to address all domains of functioning, and provided in multiple settings for no more than 40 hours per week, across all settings, depending on the individual's needs and progress. Interventions can be delivered in a one-to-one ratio or small group format, as appropriate.

(3) "Evidence-based practice" means a decision making process that integrates the best available scientifically rigorous research, clinical expertise, and individual's characteristics. Evidence-based practice is an approach to treatment rather than a specific treatment. Evidence-based practice promotes the collection, interpretation, integration, and continuous evaluation of valid, important, and applicable individual- or family-reported, clinically-observed, and research-supported evidence. The best available evidence, matched to consumer circumstances and preferences, is applied to ensure the quality of clinical judgments and facilitates the most cost-effective care.

(4) "Parent participation" shall include, but shall not be limited to, the following meanings:

(A) Completion of group instruction on the basics of behavior intervention.

(B) Implementation of intervention strategies, according to the intervention plan.

(C) If needed collection of data on behavioral strategies and submission of that data to the provider for incorporation into progress reports.

(D) Participation in any needed clinical meetings.

(E) Purchase of suggested behavior modification materials or community involvement if a reward system is used.

5. HRC, as the party seeking a modification of an existing service or support, bears the burden of proving by a preponderance of evidence that a change is warranted. (Evid. Code, §§ 115 and 500.)

6. Section 4686.2, subdivision (b)(4), of the Lanterman Act requires HRC to discontinue purchasing IBI services for a consumer when the consumer's treatment goals and objectives are achieved. Claimant has achieved significant progress on the five treatment goals and objectives set forth in the June 15, 2012 First Steps progress report. As a

consequence, 10 hours of IBI services are no longer necessary to address claimant's difficulties with non-responsiveness and compliance, lack of response to authority in a timely and appropriate manner, completion of household chores, and telephone skills. HRC's reduction determination, however, was premised on an incomplete accounting of claimant's on-going need for support and services because the full extent of claimant's on-going maladaptive behaviors was unknown to HRC. Persuasive evidence indicates that claimant presents with serious behavioral difficulties that are manifest across his home and educational settings. HRC now recognizes that additional assessments of claimant's behaviors are required to reach a better informed determination of the type and frequency of any behavioral intervention to which claimant has a statutory right under section 4686.2 of the Lanterman Act. Therefore, nothing contained in the Order set forth below precludes claimant's parents from pursuing the appropriate behavioral assessment of claimant to determine his eligibility for future services and supports as provided for under the Lanterman Act.

ORDER

1. Claimant Julian H.'s appeal is denied.

2. Harbor Regional Center may reduce claimant Julian H.'s 10 hours of weekly intensive behavior intervention services provided through First Steps for Kids to three (3) hours.

Dated: October 22, 2012

JENNIFER M. RUSSELL
Administrative Law Judge
Office of Administrative Hearings

NOTICE

THIS IS THE FINAL ADMINISTRATIVE DECISION. THIS DECISION BINDS BOTH PARTIES. EITHER PARTY MAY APPEAL THIS DECISION TO A COURT OF COMPETENT JURISDICTION WITHIN 90 DAYS.